voted for it at the next state election. *Held*, that such a statute is valid. *Hudspeth* v. *Swayze*, 89 Atl. 780 (N. J.).

The doctrine that legislatures cannot delegate their powers is well settled. *Territory* v. *Stewart*, 1 Wash. 98, 23 Pac. 405; *Slinger* v. *Henneman*, 38 Wis. 504. Decisions are in conflict, however, as to what constitutes a prohibited delegation. For historical reasons, it would seem, certain delegations to municipal corporations are valid. *State* v. *Tryon*, 39 Conn. 183. See *Paul* v. *Gloucester*, 50 N. J. L. 585, 603, 15 Atl. 272, 280. Local option laws have also generally been sustained. *Locke's Appeal*, 72 Pa. 491; *State* v. *Court of Common Pleas of Morris*, 36 N. J. L. 72. *Contra*, *Lammert* v. *Lidwell*, 62 Mo. 188. But the slight weight of authority is against the validity of state-wide referendum. *Barto* v. *Himrod*, 8 N. Y. 483; *Opinions of the Justices*, 160 Mass. 586. *Contra*, *Smith* v. *City of Janesville*, 26 Wis. 291. The courts in some of the above decisions have laid stress upon the diversity between the statutes, distinguishing between acts that purport to let a vote decide whether a law shall exist, and those that make its operation contingent upon the vote. But it is submitted that this is only a matter of form and does not warrant different results. Now statutes that are to become effective upon a contingency are clearly valid. *Pratt* v. *Allen*, 13 Conn. 119; *Home Ins. Co.* v. *Swigert*, 104 Ill. 653. The statute in the principal case seems clearly contingent, but it might be argued that the contingency was objectionable because it involved a delegation of legislative discretion if not of actual law-making power. But the statute is very analogous to local option laws, though such laws may be regarded as somewhat exceptional because the result of the vote, as an indication of the possibility of enforcing the law, is really a factor in determining the expediency of their enactment. Furthermore the delegation of some discretion is not unusual. *Buttfield* v. *Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 27 Sup. Ct. 367. Since in the principal case the legislature retained its power to give life to the law, and merely provided that the contingency making the law operative was the decision of the sovereign people instead of its own, the decision seems correct in holding this contingency unobjectionable. *Smith* v. *City of Janesville*, *supra*; *State* v. *Parker*, 26 Vt. 357. See dissenting opinion by Holmes, *Opinion of the Justices*, *supra*.

CONTRIBUTORY NEGLIGENCE — "LAST CLEAR CHANCE" DOCTRINE — EFFECT OF CONCURRENT NEGLIGENCE OF THE PLAINTIFF.— In an action for death caused by the negligence of the defendant's motorman, the trial court charged that if the motorman saw, or by due care could have seen that the decedent was unconscious of his danger, in time to avoid the accident by the exercise of reasonable care, the plaintiff could recover even though the decedent himself could have avoided the accident up to the instant of the injury. *Held*, that the instruction is erroneous, in that it allows recovery in a case of concurrent negligence where the defendant did not actually realize the danger. *Indianapolis T. & T. Co.* v. *Davy*, 103 N. E. 1098 (Ind. App.).

The "last clear chance" doctrine is properly applicable only when the defendant has a later opportunity than the plaintiff to avoid the accident by the use of reasonable care. *Nashua Iron etc. Co.* v. *Worcester & N. R. Co.*, 62 N. H. 159. See 26 HARV. L. REV. 369. Accordingly, in situations where the plaintiff himself could have prevented the injury up to the last moment by the exercise of due care, recovery should not be allowed, at least where the defendant's negligence involves only a failure to realize the plaintiff's danger. *Dyerson* v. *Union Pacific R. Co.*, 74 Kan. 528, 87 Pac. 680; *Southern Ry. Co.* v. *Bailey*, 110 Va. 833, 67 S. E. 365. But there is a growing tendency among the authorities to grant relief in spite of the plaintiff's coincident opportunity to avoid, when the plaintiff is merely inattentive to the danger and the de-

fendant actually appreciates the situation and negligently fails to avoid the accident. *Cavanaugh* v. *Boston & Maine R. Co.*, 76 N. H. 68, 79 Atl. 694; *Harrington* v. *Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15; *Kelley* v. *Chicago, B. & Q. R. Co.*, 118 Ia. 387, 92 N. W. 45. The plaintiff's own ability to prevent the injury makes it impossible to reach this result on any correct theory of "last clear chance." *Butler* v. *Rockland, T. & C. St. Ry. Co.*, 99 Me. 149, 58 Atl. 775; *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 84 Atl. 301, 524. Of course, if the defendant's conduct were wilful or wanton, contributory negligence would be immaterial. *Aiken* v. *Holyoke Street Ry. Co.*, 184 Mass. 269, 68 N. E. 238. But when the defendant is merely negligent with reference to the danger, even when seen, the only ground for recovery appears to be that of the two concurrent negligences, the defendant's is the more culpable. This revival of the discredited doctrine of comparative negligence, if it is to be accepted at all, must certainly be limited, as in the principal case, to situations where the danger is actually seen by the defendant. For where both parties are merely inattentive, the comparison cannot be unfavorable to the defendant. Even in this form, however, the doctrine is a serious encroachment upon the defense of contributory negligence.

CORPORATIONS — CAPITAL, STOCK AND DIVIDENDS — RIGHT OF PREFERRED STOCKHOLDERS TO OBJECT TO EXTRAORDINARY DIVIDENDS.— The defendant corporation declared an extraordinary dividend on common stock from the proceeds of the sale of certain assets. Preferred stock was entitled to only four per cent dividends. The plaintiff, a preferred stockholder, seeks to enjoin the distribution as dividends on the ground that these assets were capital. *Held*, that the dividends are proper. *Equitable Life Assurance Society* v. *Union Pacific R. Co.*, N. Y. L. J. 25 (N. Y. Sup. Ct., April 2, 1914).

If dividends are proper, the directors have discretion whether to declare any or not. *McKean* v. *Biddle*, 181 Pa. 361, 37 Atl. 528; *Field* v. *Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126. It is generally stated that dividends cannot be paid out of capital, but only out of profits. See *In re Exchange Banking Co.*, 21 Ch. Div. 519, 526; *Painesville & Hudson R. Co.* v. *King*, 17 Oh. St. 534, 541. But to make the propriety of dividends depend on what might be called capital, and what profits, under various systems of bookkeeping, would be inexpedient. Hence the test actually adopted seems to be that, except for mining and similar corporations, dividends are proper when the assets of the company exceed the liabilities including outstanding stock. *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. Div. 198; *Hazeltine* v. *Belfast & Moosehead Lake R. Co.*, 79 Me. 411, 10 Atl. 328. Dividends may be issued from this surplus whether it comes from income or sales of property increased in value. *Hazeltine* v. *Belfast & Moosehead Lake R. Co.*, *supra*; *Lubbock* v. *British Bank of South America*, *supra*. See *Mackintosh* v. *Flint & P. M. R. Co.*, 34 Fed. 582, 605. The rights of preferred and common stockholders *inter se* depend on the articles of association. *Elkins* v. *Camden & Atlantic R. Co.*, 36 N. J. Eq. 233; *Scott* v. *Baltimore & Ohio R. Co.*, 93 Md. 475, 49 Atl. 327. In the principal case the articles of association provided that the preferred stock should have no share in the "profits" above four per cent. This language would seem to require the same construction here as when used by the courts in determining the propriety of dividends. On winding up a corporation, it has been held that in the absence of express provision, the assets will be distributed equally between preferred and common shareholders. *Sumrall* v. *Commercial Building Trusts*, 106 Ky. 260, 50 S. W. 69; *In re North West Argentine Ry. Co.*, [1900] 2 Ch. 882. How the articles of association in the principal case would be construed as regards the division of assets in such a situation, is doubtful. But as the principal case concerned dividends, the decision seems clearly correct.